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No. 07-478

IN THE

Supreme Court of the United States

DETLEF F. HARTMANN,
Petitioner,

vs.

ELIZABETH BURRIS,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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Roger A. Hanson and Henry W.K. Daley, U.S. Dep't of Justice, Bureau of Justice Statistics, *Federal Habeas Corpus Review: Challenging State Court Criminal Convictions* 11 (September 1995) 5

ARGUMENT IN REPLY

The petition showed that the decision below expands a clear conflict in the circuits about whether a motion for discretionary reduction of a sentence is an "application for State post-conviction or other collateral relief" and thus tolls the AEDPA's one-year period of limitations to file a federal *habeas* petition under 28 U.S.C. § 2244(d)(2). Respondent concedes this: "The Tenth Circuit . . . has decided that motions for reduction of sentence do trigger [this] tolling provision," while three other courts of appeals have now held that "a motion for reduction or modification of sentence does not trigger the tolling provision of § 2244(d)(2)." Opposition at 7, 10.

The petition also showed that this clear conflict, coupled with the unresolved state of the law in the other seven circuits, creates an intolerable level of uncertainty in the administration of post-conviction remedies. This uncertainty effectively requires hundreds of state prisoners to pursue simultaneous state and federal proceedings to avoid waiving either. Respondent does not even mention these consequences. And while Respondent devotes all but a single paragraph of her argument to the merits, she fails to raise any serious reason to doubt that the decision below is incorrect.

1. While Respondent does not dispute the existence of a direct conflict over the tolling effect of a motion to reduce a sentence, she nonetheless suggests that "the position of the Tenth Circuit is less clearcut than portrayed by petitioner." Opposition at 10. The decisions she cites, but does not discuss, offer no support for that claim.

All of the decisions Respondent cites are unpublished and thus do not constitute legal precedent under Tenth Circuit rules. 10th Cir. R. App. P. 32.1(A) ("Unpublished decisions are not precedential"); *see, e.g., TMJ Implants, Inc.* v. *Aetna, Inc.*, 498 F.3d 1175, 1189 (CA10 2007) ("this circuit uses the adjective *unpublished* to refer to opinions with no precedential force. . .") (emphasis original). Beyond the fact that none of the cited decisions have any precedential effect, two of them involve off-hand statements that are clearly *dicta*.[1] The remaining decision, *Heinken* v. *Higgens*, 172 Fed. Appx. 986 (CA10 2006), was decided without argument and released shortly after the Tenth Circuit's first precedential decision on this issue, *Robinson* v. *Golder*, 443 F.3d 718 (CA10 2006); *see* Docket, No. 06-6003 (CA10 2006), *available at* 2006 WL 979310.[2] Whatever the *Heinken* panel's awareness of the Tenth Circuit's own recently published precedential decision, it is clear that *Robinson*'s analysis was expressly reaffirmed in another published decision of the circuit issued a few months later, *Howard* v. *Ulibarri*, 457 F.3d 1146 (CA10 2006). Thus, there is no question about the authoritative position of the Tenth Circuit: a motion for discretionary reduction of sentence clearly tolls the limitations period.[3]

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[1] *Clemens* v. *Sutter*, 230 Fed. Appx. 832, 834 n.1 (CA10 Cir. 2007) ("even if Clemens' § 982a petition did toll the limitations period for the single day it was pending, his § 2254 petition would still be untimely"); *Williams* v. *Beck*, 115 Fed. Appx. 32, 33 (CA10 2004) ("at most, the limitation period was tolled for eight days" where the deadline was missed by months).

[2] *Heinken* was released on April 14, 2006, and *Robinson* on March 30, 2006.

[3] It is important as well to note that the three unpublished opinions Respondent cites all relate to an Oklahoma statute. The two published – and precedential – opinions of the Tenth Circuit analyze procedural rules in

2. Respondent contends without analysis that "the conflict identified by petitioner does not warrant review at this time." Opposition at 7. Yet her opposition does not even address the problem of simultaneous state and federal proceedings that are the current, unavoidable result of the rule adopted by the court below. *See* Petition at 10-11. Nor does she mention the critical problem of uncertainty in the circuits that have yet to address the tolling effect of a motion to reduce a sentence. *See* Petition at 9. In seven circuits spanning 34 states, an inmate cannot know whether waiting to file a federal *habeas corpus* petition until after the state court's delayed completion of its sentence review will foreclose pursuit of federal *habeas*. Thus, state inmates not only in the Third, Fourth and Eleventh Circuits, but in all those circuits that have yet to address this issue, are well advised to assume that state sentence-review proceedings have no tolling effect and to file for federal *habeas* relief within a year, even if a state proceeding is still unresolved. Respondent's failure to address these problems of uncertainty and dual state-federal proceedings is inexplicable. This Court's decisions have long recognized an extraordinary federal interest in avoiding interference with state criminal proceedings and in just, uniform administration of *habeas corpus*. *See, e.g.*, *Thompson* v. *Keohane*, 516 U.S. 99, 106 (1995).

3. Respondent devotes the bulk of her argument to contending that the decision below was correct, based primarily on the fact that a Rule-35(b) motion may seek modification of the sentence as a matter of judicial discretion rather than as an attack based on a "legal flaw in the

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Colorado and New Mexico that are particularly similar to the Delaware rule at issue in this case and the West Virginia rule at issue in *Walkowiak* v. *Haines*, 272 F.3d 234 (CA4 2001).

proceedings." Opposition at 7. Respondent claims on that account that such a motion cannot constitute "State post-conviction or other collateral review" within the meaning of 28 U.S.C. § 2244(d)(2), but why that should be true is left a complete mystery.

While there is no dispute that a Rule-35(b) motion seeks discretionary relief from the state court, Respondent offers neither reasoning nor authority for the claim that discretionary relief does not seek "State post-conviction or other collateral relief with respect to the relevant judgment or claim," 28 U.S.C. § 2244(d)(2). Clearly such a motion seeks *relief* – in the form of a reduced sentence – in a proceeding that follows final judgment on the conviction and is separate from – and thus *collateral* to – the principal criminal proceeding. Nowhere does Respondent even discuss the plain language of the statute, *see* Petition at 12-13, and the Court has repeatedly held that the language Congress used in the AEDPA controls. *See, e.g., Artuz* v. *Bennett,* 531 U.S. 4, 8-10 (2000).

Neither does Respondent address the fact that the decision below (like the decisions of the Fourth and Eleventh Circuits) is at odds with the principles of comity, finality and federalism. *See* Petition at 13-16. Indeed, Respondent concedes that a motion to reduce a sentence brought under Delaware Rule 35(b) poses no serious threat to the finality of state sentences because it must be brought within 90 days after the sentence becomes final.[4] Opposition at 6 n.1.

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[4] Respondent does hint that finality could be disrupted because motions under Rule 35(b) challenging the conditions of probation or partial confinement can be brought at any time. Opposition at 6 n.1. But Respondent makes no effort to support her assertion. Obviously, "[m]ost prisoners filing

Respondent instead defends her position simply by citing the two circuits that concur with the position below and quoting cryptically from this Court's decision in *United States* v. *Addonizio*, 442 U.S. 178, 186 (1979). Opposition at 8. *Addonizio* has no relevance to the issue at hand. There, this Court considered whether 28 U.S.C. § 2255 authorized a district court to re-sentence a federal prisoner when the Parole Commission had exercised its statutory discretion in a way that did not honor "the subjective intent of the sentencing judge." 442 U.S. at 187. In holding that the judge had no such power, the Court noted that such a basis was not among those traditionally justifying *habeas* relief and simply restated this conclusion by noting that the claim for relief did not "meet any of the established standards of collateral attack." *Id.* at 186. Thus, the holding addressed the limits of the federal courts' Section-2255 authority to address a disagreement with the Parole Commission. It did not, even in 1979, provide an all-purpose definition of what was encompassed within the term "collateral attack." More obviously, the holding that re-sentencing could not be justified there tells us nothing at all about the meaning or outer limits of "post-conviction or other collateral relief" as those words were used in a statute enacted in 1996.

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habeas corpus petitions in Federal court have been convicted of violent crimes by State trial courts and have been given a severe sentence." Roger A. Hanson and Henry W.K. Daley, U.S. Department of Justice, Bureau of Justice Statistics, *Federal Habeas Corpus Review: Challenging State Court Criminal Convictions* 11 (September 1995), *available at* http://www.ojp.gov/bjs/pub/pdf/fhcrcscc.pdf. And, because probationers and criminal defendants in half-way houses have generally received punishments at the low end of the options available to the court, there is no reason to expect that they would likely be filing large numbers of discretionary motions for sentence reduction.

Respondent's citation to *Addonizo*, coupled with her failure to support her position based on the text of the statute, its purposes or the principles of comity, finality and federalism, underscores the lack of legal foundation for the position of the court of appeals in this case.

CONCLUSION

For the foregoing reasons, the Court should grant this petition for a writ of *certiorari*.

Respectfully submitted,

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